



FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

AUG 16 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Nicol Bybee

Orem, Utah 84057

RE MUR 5333

Dear Ms. Bybee:

On November 30, 2002, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, the Commission, on June 30, 2004, found that there is reason to believe you violated 2 U.S.C. § 441f, a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Also on June 30, 2004, the Commission determined to take no action at this time with respect to you regarding the allegation in the complaint that you violated 2 U.S.C. § 441a(a)(1)(A).

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred.

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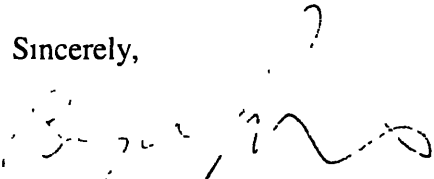
Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,


Bradley A. Smith
Chairman

Enclosures
Designation of Counsel Form
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT Nicaïl Bybee

MUR 5333

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Scott Clayton *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL AND LEGAL ANALYSIS

A. Complaint and other available information

The complaint alleges that Nicaïl Bybee made excessive contributions to John Swallow for Congress (“Committee”) The complaint listed Nicaïl Bybee as contributing \$2,000 to the Committee The Committee disclosed the receipt from Nicaïl Bybee of \$1,000 on March 31, 2002, which was designated for the Republican party convention, and \$1,000 on June 26, 2002, which was designated for the primary election As reported on the Committee’s disclosure reports, therefore, Nicaïl Bybee’s contributions are within the limits of 2 U.S.C. § 441a(a)(1)(A)

The available information indicates that Nicaïl Bybee’s contributions were made by checks drawn on the account of Winterfox, LLC (“Winterfox”) The Winterfox checks were attributed to Nicaïl Bybee and several other persons, as set forth in the chart below Winterfox is a limited liability company (“LLC”) identified in public records as an active LLC organized in Utah.

Check drawn on account	Check date	Amount	Attributed persons (\$1,000 each)
Winterfox, LLC	3/28/02	\$5,000	Nicaïl Bybee, Tamra Bybee, Taige Bybee, Evan Bybee, Kara Davis
Winterfox, LLC	6/28/02	\$5,000	Nicaïl Bybee, Tamra Bybee, Taige Bybee, Evan Bybee, Brenn Bybee

In the first instance, Winterfox wrote a \$5,000 check to the Committee dated March 28, 2002, signed by Evan Bybee, with a memo line reading "From Evan, Tamra, Taige, Kara, Nicaïl \$1000 ea," i.e., the four Bybees and Kara Davis. The Committee sent a letter to Winterfox, dated April 4, 2002, expressing thanks for the contribution and then stating:

The strict Federal Election Commission regulations [prohibit] making contributions on behalf of someone else to federal election campaigns. We must refund this money to you within thirty (30) days unless you can establish in writing that the contribution came from personal funds of a corporate drawing account, such as a draw against salary, wages, dividends, etc. Please confirm that such was indeed the case with this check by signing below. ..

The letter provides fields for the signature, occupation, employer and date of each Bybee and of Kara Davis. The completed fields contain signatures, occupations and employers for all five individuals dated April 10 and 11, 2002. One of the five, Tamra Bybee, listed Winterfox as her employer, Taige Bybee and Nicaïl Bybee listed other entities, and Evan Bybee and Kara Davis listed "self." The Committee did not disclose Winterfox as the employer of any of the five individuals.

The available information also indicates that Winterfox wrote a \$5,000 check to the Committee dated June 28, 2002, that was signed by Evan Bybee and contained a memo line reading "1,000 ea Evan, Tamra Bybee, Taige Bybee, Nicaïl Bybee, Brenn Bybee," i.e., the four Bybees noted above and Brenn Bybee. The available information does not include any

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Committee letter regarding the June 28, 2002 Winterfox check. Nicaïl Bybee did not respond to the complaint

B. Law on contributions by LLCs, corporations and partnerships

The Commission's regulations establish two possible treatments for contributions by business entities that are recognized as limited liability companies under the laws of the State in which they are established. 11 C.F.R. § 110.1(g)(1). The treatment depends on how the firm elects to file with the Internal Revenue Service ("IRS") *Id.* at 110.1(g)(2). If the contribution is from an LLC filing with the IRS as a partnership pursuant to 26 C.F.R. § 301.7701-3, or from one that fails to make an election, it shall be treated as a contribution from a partnership pursuant to 11 C.F.R. § 110.1(e) *Id.* If the contribution is from an LLC electing to file with the IRS as a corporation, the contribution is prohibited 2 U.S.C. § 441b(a) and 11 C.F.R. § 110.1(g)(3). An LLC that makes a contribution pursuant to this provision shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed, and affirm to the recipient committee that it is eligible to make the contribution 11 C.F.R. § 110.1(g)(5).

The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits corporations from making contributions in connection with any election and prohibits any candidate or political committee from knowingly accepting or receiving any such contributions 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any officer or director of any corporation from consenting to any contribution by the corporation. The Commission has recognized, however, limited circumstances in which a corporate employee may make a contribution drawn on a corporate account, specifically, a nonrepayable corporate drawing account established to permit an employee to draw against her salary, profits or other

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1 compensation. *See Campaign Guide for Congressional Candidates and Committees* (2002),
2 page 21; *FEC Record*, September 1978, page 1¹ Contributions may not be made from the
3 general treasury fund of corporations. *See* 2 U.S.C. § 441b(a), *cf. FEC v. Massachusetts Citizens*
4 *for Life*, 479 U.S. 238, 241 (1986)

5 A contribution by a partnership shall be attributed to the partnership and to each partner
6 in one of two ways 1) in proportion to his or her share of the profits, according to instructions
7 which shall be provided by the partnership to the political committee or candidate; or 2) by
8 agreement of the partners, as long as only the profits of the partners to whom the contribution is
9 attributed are reduced (or losses increased), and these partners' profits are reduced (or losses
10 increased) in proportion to the contribution attributed to each of them. 11 C.F.R. § 110.1(e). A
11 contribution by a partnership shall not exceed the Act's limitations on contributions, and no
12 portion of such contribution may be made from the profits of a corporation that is a partner *Id*

13 **C. Analysis of contributions**

14 Winterfox, an LLC, wrote \$10,000 in contribution checks to the Committee Winterfox
15 attributed this amount to Nicail Bybee and several other persons No contributions were
16 attributed to the LLC itself. The threshold question regarding LLC contributions is whether the
17 LLC is to be treated as a corporation or as a partnership, which depends on whether the LLC
18 elected federal income tax treatment as a corporation. *See* 11 C.F.R. § 110.1(g). The available
19 information does not indicate whether Winterfox elected tax treatment as a corporation.

¹ The only place in the Act or the Commission's regulations that specifically addresses the making of contributions through nonrepayable corporate drawing accounts is in the context of contributions to separate segregated funds. *See* 11 C.F.R. § 102.6(c)(3). This regulation provides that a contributor may write a check that represents both a contribution and payment of dues or other fees that must be drawn on the contributor's personal checking account or on a "non-repayable corporate drawing account of the individual contributor." *Id.* *See also* Explanation and Justification, 48 Fed. Reg. 26,297 (June 7, 1983)

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1 The Winterfox checks on their face attribute the contributions among several individuals,
2 but it does not appear that the LLC affirmed to the Committee that it is eligible as an entity to
3 make the contributions in the first place. *See* 11 C.F.R. § 110.1(g)(5). Instead, the Committee's
4 letter in response to the first Winterfox contribution check invites the attributed individual
5 contributors to categorize the contributions as coming from "personal funds of a corporate
6 drawing account, such as a draw against salary, wages, dividends, etc." Each individual
7 contributor appeared to agree with this categorization by signing in the space provided. While
8 the Commission permits contributions from corporate employees drawn on nonrepayable
9 corporate drawing accounts, *see supra*, the contributions here do not appear to be drawn on such
10 accounts. First, the checks appear to be drawn on the general treasury account of an LLC, no
11 account name is indicated on the checks relating to a possible nonrepayable drawing account.
12 Second, the attributed individual contributors may not even be employees of the LLC. As noted
13 above, only a single attributed contributor listed Winterfox as her employer.

14 There appear to be contributions made in the name of another whether Winterfox was
15 treated as a corporation or as a partnership. The Act prohibits contributions made in the name of
16 another person and prohibits a person from knowingly permitting her name to be used to effect
17 such a contribution. *See* 2 U.S.C. § 441f. If Winterfox was treated as a corporation, then it made
18 contributions in the names of the various individuals to whom the contributions were attributed.
19 If Winterfox was treated as a partnership, then the attributed partners made contributions in the
20 names of the other individuals who are not partners. In addition, the various attributed individual
21 contributors may have knowingly permitted their names to be used to effect the LLC
22 contributions on their behalf. *See* 2 U.S.C. § 441f. Therefore, there is reason to believe that
23 Nicaïl Bybee violated 2 U.S.C. § 441f.